

BEFORE THE
SUPERINTENDENT OF SCHOOLS
COUNTY OF MERCED
STATE OF CALIFORNIA

In The Matter of the Reduction In Force of:

OAH No. 2011030795

CERTAIN CERTIFICATED PERSONNEL
EMPLOYED BY THE MERCED
COUNTY SUPERINTENDENT OF
SCHOOLS,

Respondents.

PROPOSED DECISION

This matter was heard before Administrative Law Judge Jonathan Lew, State of California, Office of Administrative Hearings, on April 6, 2011, in Merced, California.

Todd A. Goluba, Attorney at Law, appeared on behalf of Merced County Office of Education (MCOE).

Joshua F. Richtel, Attorney at Law, appeared on behalf of respondents Catrina Yost and Leslie Morris. Ms. Morris also appeared personally.

Evidence and testimony were received. Submission of the matter was deferred pending receipt of written argument. Respondents' brief was filed on April 7, 2011, and marked as Exhibit B for identification. MCOE's brief was filed on April 8, 2011, and marked as Exhibit 13 for identification. The case was submitted for decision on April 8, 2011.

FACTUAL FINDINGS

1. Eva L. Chavez is the Assistant Superintendent of MCOE. She is the designee of Merced County Superintendent of Schools, Steven E. Gomes. The actions of Ms. Chavez in making and filing the Accusation were taken in her official capacity.

2. Respondents Leslie Morris and Catrina Yost are permanent or probationary certificated employees of MCOE. On March 14, 2011, MCOE served on each respondent a written notice that it had been recommended that notice be given to respondents pursuant to Education Code sections 44949 and 44955 that their services would be reduced or would not be required for the 2011-2012 school year. Each written notice set forth the reasons for the recommendation and noted that the County Superintendent had adopted a Resolution reducing the certificated staff by 9.0 full-time equivalent (FTE) positions. Respondents timely requested in writing a hearing to determine if there is cause for not reemploying them for the ensuing school year.

3. On March 25, 2011, MCOE timely served Accusations with required accompanying documents and blank Notices of Defense on respondents. Respondent timely filed Notices of Defense to the Accusation.

4. By letter dated March 14, 2011, MCOE Assistant Superintendent Eva L. Chavez gave the County Superintendent notice of her recommendations that ten certificated employees be given notice that their services would be reduced or not required for the next school year and stating the reasons for that recommendation.

5. On March 11, 2011, the County Superintendent determined that it was necessary to decrease programs and services and thus it was necessary to reduce teaching and other certificated services affecting employment of 9.0 FTE positions. The County Superintendent adopted Resolution No. 2011-04 providing for the reduction or elimination of the following particular kinds of services (PKS):

<u>Services</u>	<u>Equivalent Positions</u>
Independent Study Teacher	2.0 (184 days)
Deaf and Hard of Hearing Teacher	1.0 (184 days)
CTE Office Tech in Med. Environ./ Marketing Instructor	1.0 (220 days)
CTE Office Tech/Marketing/ Customer Service Instructor	1.0 (220 days)
CTE Warehousing/Logistics Instructor	1.0 (220 days)
CTE Accounting/Comp. Office Tech Instructor	1.0 (220 days)
CTE Auto Mechanics Instructor	1.0 (184 days)
CTE Construction Trade Instructor	1.0 (184 days)
TOTAL	9.0 FTE

6. MCOE provides support to Merced County's 20 school districts, serving more than 55,000 K-12 students of all abilities through assistance with curriculum and instruction, career and alternative education, business services, technology, special education, and teacher credentialing. Assistant Superintendent Eva Chavez noted that MCOE reviewed its

financial situation, uncertainties around the State budget and declining enrollment in determining that it was necessary to reduce or eliminate particular kinds of services.

The County Superintendent's resolution to reduce or discontinue particular kinds of services was made in anticipation of decreased revenues. The proposed reductions are necessary for MCOE to remain solvent.

Competency Criteria

7. Paragraph two of Resolution No. 2011-04 provides that for the purpose of implementing the Resolution, a more senior employee would be "competent" for reassignment into a position held by a more junior employee pursuant to Education Code section 44955, subdivision (b), if the employee:

- (A) currently possesses clear or preliminary credential(s) authorizing the subject(s) to be taught in an alternative education classroom setting to which the employee will be assigned at the beginning of the 2011-2012 school year, and
- (B) has taught the subject area or served in a classroom teaching position and in the alternative education classroom setting to which he/she will be assigned at the beginning of the 2011-2012 school year for at least one school year in the past three school years, and
- (C) has "highly qualified" status under the No Child Left Behind Act (NCLB) and has a single subject or supplemental credential in the subject matter to which he/she will be assigned in an alternative education classroom setting at the beginning of the 2011-2012 school year, and
- (D) possesses a currently valid and properly filed CLAD, BCLAD, SDAIE or other regular (non-emergency) EL certificate valid for the 2011-2012 school year which will permit the employee to provide instruction to English Language Learners in his/her assignment for the 2011-2012 school year

Leslie Morris

8. Respondent Leslie Morris is one of 13 independent study teachers. Her MCOE seniority date is November 26, 2007. She and respondent Catrina Yost are the two most junior independent study teachers. Ms. Morris holds a preliminary single subject teaching credential in English. She completed the Verification Process Specific Setting (VPSS), making her "highly qualified" to provide instruction in English and Social Science. She is enrolled in a program to become VPSS certified for science as well. As an

independent study teacher for grades 9 – 12, Ms. Morris teaches all core subjects including social sciences, sciences (earth, life and physical), English, mathematics and art. She is assigned 24 students. She is also assigned to the “Success Lab,” a program where all independent study students go to receive additional instruction in all subjects. Ms. Morris provides daily instruction at the Success Lab, from 9:00 a.m. to noon. In providing Success Lab assistance to students assigned to other independent study teachers, Ms. Morris and the students’ teachers collaborate in their instruction. On average, six to eight students attend Success Lab each day. As few as three, and as many as 15 students may appear for Success Lab on a given day. The great majority of time spent instructing students in the independent study program is done one on one. Occasionally, Ms. Morris will provide small group instruction to students in Success Lab.

Students enrolled in independent study require remedial as well as grade level instruction. Independent study teachers meet at least weekly with students. Instruction is individualized and largely provided one on one. Instruction is not provided in a classroom setting. Classroom lectures/presentations are rarely, if ever, offered. Students typically bring their assignments to the independent study teacher for review during a weekly meeting.

Ms. Morris would like to bump into the Charter Home School teacher position currently assigned to a junior teacher, Crystal Sousa. Ms. Sousa’s seniority date is August 24, 2009. Ms. Sousa holds a clear single subject teaching credential with single subject authorizations for both social science and English. MCOE contends that Ms. Morris is neither certificated nor competent under paragraph 2 of Resolution 2011-04 to bump into Ms. Sousa’s Charter Home School teaching position. MCOE believes that Ms. Morris needs a single subject authorization for social sciences to bump into Ms. Sousa’s teaching position. It also believes that Ms. Morris failed to meet the competency (recency) requirement of providing instruction in an alternative education classroom setting for “at least one school year in the past three school years.” The credentialing and competency matters are separately discussed below.

Catrina Yost

9. Respondent Katrina Yost is also an independent study teacher. Her MCOE seniority date is June 25, 2007. She holds a multiple subject credential. She and Ms. Morris are the two most junior independent study teachers. Ms. Yost did not appear in these proceedings.

MCOE’s Reason for Disallowing Reassignment

10. Ms. Chavez explained MCOE’s rationale for disallowing the bump. MCOE started the charter school five or six years ago. It has evolved into a program that now prides itself in offering and satisfying course requirements for admission into the University of California (UC). Reference at hearing was made to the charter school being accredited by UC as offering “A – G Equivalent” instruction. This is not true of MCOE’s independent study program. There are similarities and differences in the two programs. Both programs

are home-based, provide education in grades 9 – 12 core subjects, and offer highly individualized instruction. However, students enroll in the charter school program with the expectation of receiving a college preparatory education necessary to gain admission into the UC system. In contrast, independent study students are offered grade level instruction, but receive largely remedial instruction. Ms. Chavez noted that there is also more group instruction in the Charter Home School program, and more collaboration among Charter Home School teachers than in the independent study program.

Importantly, to receive and retain A – G Equivalent accreditation, MCOE contends that its Charter Home School teachers, considered as a whole, must hold certain credentials, including the single subject teaching credential in social science held by Ms. Sousa. The holder of the single subject credential in a given area becomes the program’s subject matter expert. They are responsible for developing benchmark assessments for measuring student progress in each particular subject. These assessments or tests must be given by MCOE to retain accreditation by the University of California. Charter Home School teachers do teach most, if not all subjects to their students. This is not unlike independent study teachers. However, the Charter Home School teacher holding a particular single subject credential is also responsible for overseeing the development of benchmark assessments, maintaining A – G Equivalent accreditation and being available to students requiring instruction/access to their “expertise” in that subject. In the case of Ms. Sousa, the subject is social science.

Ms. Chavez noted that as positions are filled by MCOE in the Charter Home School program, consideration is given to the specific credentials needed to maintain A – G Equivalent accreditation. MCOE’s intent in establishing its Charter Home School program is to offer an alternative pathway for students to satisfy requirements for admission into the University of California. Ms. Chavez is concerned that allowing the bump into Ms. Sousa’s position would compromise the ability of MCOE to meet University of California certification requirements.

Discussion

11. Credentialing. Preliminarily, school districts have broad discretion to establish competency standards for purposes of exercising bumping rights. (*Duax v. Kern Community College District* (1987) 196 Cal.App.3d 555, 564.) This broad discretion is limited only by a reasonableness standard, and so the district’s decisions must not be fraudulent, arbitrary or capricious. Such standard permits “a difference of opinion on the same subject.” (*Campbell Elementary Teachers Association v. Abbott* (1978) 76 Cal.App.3d 796, 808.) Competence is therefore the threshold inquiry prior to exercising bumping rights. If a permanent certificated teacher is certificated and competent to render a service provided by a more junior teacher, the senior teacher is entitled to bump into the junior position. (Ed. Code, § 44955, subd. (b).)

12. Paragraph two of Resolution No. 2011-04 provides that for the purpose of implementing the Resolution, a more senior employee would be “competent” for reassignment into a position held by a more junior employee pursuant to Education Code section 44955, subdivision (b), if the employee “currently possesses clear or preliminary

credential(s) authorizing the subject(s) to be taught in an alternative education classroom setting to which the employee will be assigned at the beginning of the 2011-2012 school year, ...”

MCOE first contends that in order for Ms. Morris to bump into Ms. Sousa’s position, she must demonstrate that she is “certificated and competent” to perform Ms. Sousa’s full particular assignment, and not “certificated and competent” to serve in the Home School Charter School in general. MCOE urges consideration of how the Charter Home School program has evolved. At one time, MCOE hired individuals with Multiple Subject credentials to teach at the Charter Home School. It no longer does so. In recent years MCOE received accreditation to allow students who attend that program to receive credit for the A – G requirements necessary to gain admittance to the UC system. MCOE now advertises this benefit and attracts students based upon this representation. MCOE fears that by replacing Ms. Sousa, it would lose its Social Science subject matter expert and compromise its UC accreditation. MCOE established that it now considers the credentials held by Charter Home School program teachers as a whole, in maintaining a viable UC accredited program.

13. Respondents, understandably, urge only general consideration of baseline credentials needed to teach in the Charter Home School program. Two current Charter Home School teachers hold only multiple subject credentials. A third holds a single subject credential in life science. A fourth holds a single subject credential in home economics. Respondents note that if it were true that MCOE had to assign only single subject teachers for UC accredited classes or face losing accreditation, then MCOE arguably should not be able to offer courses outside of English, Social Studies, Science and Spanish, as there are no employees with a single subject outside of these areas.¹

14. Respondents also believe that the holding of a single subject credential in social science is only one of three avenues for establishing subject matter expertise for purposes of UC accreditation. Official notice under Government Code section 11515 is taken of UC’s “Policy on Non-Site Based Independent Study Schools” and in particular its definition of a subject expert teacher: “A subject expert teacher is defined as an instructor who has taught in a particular subject area for at least three years at the high school or postsecondary level OR has a teaching credential and a bachelor’s or advanced degree in the subject area OR has been certified as a Highly Qualified Teacher under the federal No Child Left Behind Act.”

¹ MCOE’s Charter Home School program offers the following accredited classes outside of these single subjects: Algebra 1, Algebra 2, Geometry, Fine Art, Graphic Art, The Art and History of Floral Design, The Art of Animation, Economics and Food Science.

Ms. Morris believes that she meets the first and third test because she has taught at MCOE since the 2007-2008 school year, and has instructed high school students in Independent Studies in Social Studies over these three years. She also contends that she is highly qualified for purposes of No Child Left Behind (NCLB) because she was certified through the VPSS process and should now be considered an expert in social science.

15. MCOE disputes the above, noting that Ms. Morris has taught only in an independent study setting and has not taught for at least three years at the high school or postsecondary level. Further, MCOE contends that the VPSS process relied upon by Ms. Morris makes her “highly qualified” under NCLB only in the setting in which she is teaching – Valley School Independent Study Program, and that this authorization is not transferable to another setting such as the Charter Home School program. MCOE believes there is no evidence that VPSS in Social Science obtained for an independent study program serving remedial students would qualify Ms. Morris to serve as a subject matter expert in Social Science in a Charter Home School program designed to serve four-year UC-bound students.

16. MCOE’s position regarding credentialing is both reasonable and persuasive. Ms. Morris did not establish that she qualifies as a subject expert teacher even under the alternative UC criteria. In this regard, she did not establish that she has “taught in a particular subject area for at least three years at the high school or post secondary level” Teaching in a “particular subject area” suggests more focused instruction in a particular subject such as Social Sciences, and not the more general and/or remedial instruction typically provided to independent study students. It also appears that the NCLB “highly qualified” status contemplated by UC for a subject expert teacher may be different than the VPSS certification received by teachers in independent study programs.

17. Importantly, it was not unreasonable for MCOE to view the potential bump as one embracing Ms. Sousa’s full particular teaching assignment, and not merely a bump into the Charter Home School program. As noted in Finding 10, the single subject credential holder becomes the Charter Home School program’s subject matter expert. They are responsible for developing benchmark assessments for measuring student progress in each particular subject, in this case social sciences. These assessments or tests must be given by MCOE to retain accreditation by the University of California. The Charter Home School teacher holding a particular single subject credential is responsible for overseeing the development of benchmark assessments, maintaining A – G Equivalent accreditation and being available to students requiring instruction/access to their “expertise” in that subject. Ms. Morris does not appear to qualify under alternative UC criteria to be a subject expert teacher in social science. She does not hold a single subject credential in social science. She has not demonstrated that she is certificated to render the services currently assigned to, and provided by Ms. Sousa. She cannot perform the full particular teaching assignment for which Ms. Sousa is responsible.

18. Competency. Respondent's also challenge the competency standard under Resolution No. 2011-04 that a teacher have taught in the alternative education classroom setting to which she will be assigned "for at least one school year in the past three school years."² It is not necessary to consider respondents' challenge to the one year of teaching in the last three since respondents failed to demonstrate that they met threshold certification/credential requirements for the position.

19. Skipping Contentions. At hearing, the parties addressed the issue as one involving bumping under Education Code section 44955, subdivision (b). MCOE has argued in the alternative that it was entitled to skip Ms. Sousa under Education Code section 44955, subdivision (d). (See also *Bledsoe v. Biggs Unified School District* (2009) 170 Cal.App.4th 127.) MCOE contends that Ms. Sousa should be retained because it has demonstrated a "need for her to teach a specific course of study" and her possession of "special training and experience" necessary to teach the course. (Ed. Code, § 44955, subd. (d).) Given the earlier findings relating to respondents' certifications/credentials, it is unnecessary to address skipping here.

LEGAL CONCLUSIONS

1. This is a single issue case – whether respondents may, pursuant to Education Code section 44955, subdivision (b), bump into the Charter Home School position currently assigned to Ms. Sousa. Subdivision (b) provides: "Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render."

2. Education Code section 44955 provides that when certificated employees face layoffs due to economic exigency, the school district has an affirmative obligation to reassign senior teachers who are losing their positions into positions held by junior teachers, if the senior teacher has both the credentials and competence to occupy such positions. The intent of the Legislation is clearly to prevent Districts from laying off senior teachers while retaining junior teachers. If respondents are deemed certificated and competent to serve in that assignment, Education Code section 44955 affords them rights for consideration for assignment as a senior employee into positions held by junior employees.

² A definition of competency as being one year experience teaching the subject in question within the last ten years was approved by the court in *Duax v. Kern Community College District* (1987) 196 Cal.App.3d 55, 565. In *Duax*, the court noted on page 567 that since the community college district criteria "require only one year of teaching in the last ten, not one in the last two or three, we are not persuaded that it too narrowly defines competency."

3. The matters set forth in Findings 11 through 17 have been considered. Respondents have not demonstrated that they meet certification requirements to bump into the Charter Home School position currently assigned to Crystal Sousa. Given this determination, it is unnecessary to consider respondents' other contentions relating to the competency standard (one year teaching experience in the past three school years), or MCOE's alternative contention regarding skipping.

4. All notice and jurisdictional requirements set forth in California Education Code sections 44949 and 44955 were met. The notices sent to respondents indicated the statutory basis for the reduction of services and, therefore, were sufficiently detailed to provide them due process. (*San Jose Teachers Association v. Allen* (1983) 144 Cal.App.3d 627; *Santa Clara Federation of Teachers v. Governing Board* (1981) 116 Cal.App.3d 831.) The description of services to be reduced, both in the Resolution and in the notices, adequately describe particular kinds of services. (*Zalac v. Ferndale USD* (2002) 98 Cal.App.4th 838. See, also, *Degener v. Governing Board* (1977) 67 Cal.App.3d 689.)

5. The services identified in Resolution No. 2011-04 are particular kinds of services that could be reduced or discontinued under Education Code section 44955. The Merced County Superintendent's decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of his discretion.

6. Cause exists to reduce the number of certificated employees of MCOE due to the reduction and discontinuation of particular kinds of services. Cause for the reduction or discontinuation of services relates solely to the welfare of MCOE's schools and pupils within the meaning of Education Code section 44949.

RECOMMENDATION

1. Notice shall be given to respondents Leslie Morris and Catrina Yost that their services will not be required for the 2011-2012 school year because of the reduction or discontinuation of particular kinds of services.

DATED: April 12, 2011

JONATHAN LEW
Administrative Law Judge
Office of Administrative Hearings